

1415202 (Migration) [2015] AATA 3358 (20 August 2015)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANTS: Mrs Virginica Ionescu
Mr Andrei-Viorel Bondaret

CASE NUMBER: 1415202

DIBP REFERENCE(S): CLF2013/30328

MEMBER: Lisa Lo Piccolo

DATE: 20 August 2015

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the applications for Partner (Temporary) (Class UK) visas, with the direction that the first named applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:

- cl.820.211(2) of Schedule 2 to the Regulations
- cl.820.221(1) of Schedule 2 to the Regulations

Statement made on 20 August 2015 at 5:35pm

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 27 August 2014 to refuse to grant the applicants Partner (Temporary) (Class UK) visas under s.65 of the *Migration Act 1958* (the Act).
2. The first named applicant (the applicant) applied for the visa on 13 February 2013 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(a) because she was not satisfied that there was sufficient evidence to demonstrate that they are in a genuine and continuing relationship.
4. The applicants appeared before the Tribunal on 16 July 2015 to give evidence and present arguments. The Tribunal also received oral evidence from Mr Voicu Pop (the sponsor), Nicoara Gavril (a long term friend of the sponsor), and Mr Andrei-Viorel Bondaret (the applicant's son and second named applicant). The Tribunal hearing was conducted with the assistance of an interpreter in the Italian and English languages.
5. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. The issue in the present case is whether applicant is the spouse of the sponsor.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

7. Clauses 820.211 (2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
8. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

9. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The applicant and the sponsor were married on 26 January 2013 in Victoria and a certified copy of their marriage certificate was submitted to the Department. There is nothing in the information before me to cast doubt on the validity of the marriage, and it was not disputed by the delegate. The Tribunal accepts that the applicant and the sponsor were validly married under the laws of the Australia, and finds that the marriage is valid for the purposes of the Act as required by s.5F(2)(a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

10. Background
11. The applicant is a citizen of Romania who has been living in Italy for some years. She is 52 years old. The sponsor is an Australian citizen. He is 60 years old.
12. The applicant and the sponsor first met each other online. At the time they met the applicant was still legally married but had been separated for some years. They spent time connecting with each other using voice and text chat. Her son, the second named applicant had come to Australia in November 2011 on a working holiday visa and after learning of his mother's friendship with the sponsor met him and got to know him. The applicant and the sponsor met the applicant in person for the first time in April 2012. They got along well and after spending time together they felt they understood each other well and had feelings for each other. They wanted a future together. The applicant returned to Italy to finalise her affairs. During their separation they remained in daily telephone and internet communication. The applicant returned to Australia in December 2012 and the parties were married on 26 January 2013. The parties have been living together continuously since December 2012.
13. On 14 February 2013 the applicant applied for the subclass 820 visa and she was sponsored in connection with the visa application by the sponsor. The second named applicant was also included in the application. The delegate was not satisfied that there was sufficient evidence to demonstrate that they are in a genuine and continuing relationship. All of the delegate's comments were directed at the lack of evidence provided with respect to the application.
14. The Tribunal must consider all the circumstances of the relationship, (including the matters specified in r.1.15A(3)) in determining whether the parties are in a "married relationship" as defined by s.5F, and whether the relationship falls within the definition of "spouse".
15. In assessing these issues, the Tribunal has had regard to documents on the Departmental file as well as the documents submitted to the Tribunal. This includes statutory declarations from friends and family regarding the relationship, relationship statements by the sponsor and the applicant, marriage certificate, photographs of the wedding and of the applicant and sponsor together, and other correspondence from the applicant and the sponsor to the Tribunal.
16. *Financial Aspects of the Relationship*
17. The consistent evidence of the applicant and the sponsor is that the applicant finalised all of her financial affairs in Italy before moving to Australia. The applicant and the sponsor gave consistent evidence that the sponsor and his friend Mr Gavril assisted

her financially with return tickets and money to finalise her divorce from her estranged husband. The small savings she had were pooled with the sponsor and were used to contribute to day to day living expenses. The majority of time the sponsor has been living in Australia, the applicant has been on a bridging visa and has not worked. The sponsor and applicant are residing in the sponsor's home and he has been responsible for meeting all the financial commitments in their relationship including payment of mortgage and bills and food. The applicant has been responsible for maintaining the household including cooking and cleaning. The sponsor is the sole breadwinner of the family and works on and off in construction.

18. The applicant and the sponsor both gave evidence about their hopes and plans to build a future together, and for the applicant to get a job so that she can assist the sponsor to meet their expenses and grow their resources. They both discussed their current financial struggles trying to survive but both agreed they "were getting by" with the very generous assistance of Mr Gavril.

19. The Tribunal places some weight on the pooling of financial resources.

• *Nature of the household*

20. The Tribunal notes that the parties have lived together since December 2012. The applicant and the sponsor gave consistent evidence that the applicant is responsible for managing the household although the sponsor sometimes helps out on weekends. This is because the sponsor is the sole breadwinner in the family.
21. The applicant and the sponsor also gave consistent evidence that the applicant hopes to obtain employment at some point and then they would both assist each other to manage the household.
22. On the basis of the evidence before the Tribunal, the Tribunal accepts the applicants live together and intend to live together as husband and wife such that they do not live separately and apart on a permanent basis.

• *Social aspects of the relationship*

23. In relation to the social aspects of the relationship, the Tribunal notes that the applicant's son has been residing in Australia since November 2011. The consistent evidence of the parties is that he maintains very regular contact with them and even lives with them from time to time. The applicant's son gave evidence that he enjoys spending time with his mother and the sponsor and is pleased that they have formed this family together. The Tribunal also heard evidence from Mr Gavril who is the long term friend of the sponsor. He said that he and his wife spend considerable amount of time with the sponsor and the applicant together as a couple socialising, chatting and going to church together. He said they make each other very happy and are very good together. The Tribunal places some weight on this evidence.
24. The Tribunal has had regard to the small number of photographs including wedding photographs that the applicant has submitted. The Tribunal has also had regard to the statutory declarations submitted to the Department by Mr Gavril and his wife. Both declarations refer to the applicant having been welcomed into the family and to their belief that the applicant and sponsor are in a happy and loving relationship.
25. The Tribunal places significant weight on the social recognition of the relationship.

26. It is acknowledged that there is not much more material before the Tribunal than was before the delegate at the time the application was being assessed. However, the Tribunal had the benefit of taking oral evidence from the applicant, the sponsor, Mr Gavril and the applicant's son. The Tribunal assessed both the sponsor and the applicant to be highly credible witnesses. The Tribunal was impressed with the unhesitating responses to its enquiries by both the sponsor and the applicant and neither applicant attempted to embellish or exaggerate the claims in this matter. The Tribunal noted that the applicant and the sponsor gave highly consistent evidence which corroborated the documentary evidence submitted.
27. In respect to the nature of the parties' commitment, the Tribunal gives weight to the fact the couple have been in a relationship for almost four (4) years and married for almost three (3) years. They openly talked about the highs and lows of their relationship. They also talked about how their relationship has gone from strength to strength. They presented as a couple very much in love and very much committed to each other. Both parties showed a genuine level of concern for each other's welfare, life and future.
28. The Tribunal was struck by the sponsor's genuine affection and efforts to develop a relationship with the applicant's son knowing that his acceptance was important to the applicant. The Tribunal gives weight to his desire and effort to develop a relationship with the son and to include him in their family unit and support him emotionally. The Tribunal also gives weight to the fact that the applicant has become the homemaker in the relationship by cooking and cleaning.
29. The Tribunal notes that there is little in the way of documentary evidence to support the frequency of contact between the parties prior to their first meeting in April 2012 or during their subsequent separation between May 2012 and December 2012. However in view of the consistency of their evidence in relation to the method and frequency of their contact, the Tribunal accepts the parties' oral evidence that they maintained daily contact when they are apart. The Tribunal in fact accepts that they spent considerable hours each day speaking on the phone or the internet. Accordingly, the Tribunal is satisfied on the evidence before the parties' maintained contact with each other whilst living separately, this is demonstrated in their knowledge of each other's circumstances.
30. The Tribunal gives weight to the fact that, the parties have given consistent evidence of their simple plans for the future made up of calmness and happiness in the family unit. They also both talked of the applicant's desire to work in Australia to help support the household.
31. The Tribunal has taken into account the parties' respective ages, backgrounds and life experience, and accepts that neither party was in a relationship with any third party at the time of the application, or that this is the case at the time of this decision.
32. The Tribunal questioned the parties about their knowledge of each other, their families and the pattern of their lives and is satisfied that they demonstrated a knowledge of each other's lives commensurate with a couple in a genuine and ongoing spousal relationship.
33. Accordingly, the Tribunal is satisfied, considering all of the evidence cumulatively, that the sponsor and the applicant have demonstrated and continue to demonstrate a level

of commitment to one another and to their spousal relationship as contemplated in the Regulations.

34. CONCLUSIONS

35. The Tribunal is satisfied that the marriage is valid for the purposes of the Act as required by s.5F(2)(a).
36. The Tribunal is satisfied that at the time of application and time of decision the applicant and sponsor had a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship is genuine and continuing. They therefore meet the requirements of s.5F(2)(b) and s.5F(2)(c) for a married relationship.
37. The Tribunal is satisfied that at the time of application and time of decision the applicant and the sponsor have lived together, and do not live separately and apart on a permanent basis. Accordingly, they meet the requirements of s.5F(2)(d) for a married relationship.
38. The Tribunal therefore finds that at the time of the visa application the applicant was the spouse, within the meaning of s.5F, of the sponsor, who is an Australian citizen and meets the requirements of cl.820.211(2) of Schedule 2 to the Regulations. Further, the Tribunal finds that at the time of the Tribunal's decision the applicant continues to be the sponsor's spouse, and meets cl.820.221(1) of Schedule 2.
39. For these reasons the Tribunal finds that at the time of application the applicant and sponsor were in a married relationship within the meaning of s.5F(2) of the Act. The Tribunal further finds that at the time of decision, they continue to be in a married relationship.
40. Accordingly the applicant meets the requirements of cl.820.211(2)(a) and (c). The applicant therefore also meets cl.820.221(1).
41. Given these findings the Tribunal is satisfied that at the time the visa application was made and the time of this decision the parties were in a spousal relationship.
42. As the second named visa applicant applied on the basis of being a member of the first named visa applicant's family unit, his application will be determined by reference to the outcome of the first named visa applicant's application on remittal to the Department for reconsideration.

DECISION

43. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
- cl.820.211(2) of Schedule 2 to the Regulations
 - cl.820.221(1) of Schedule 2 to the Regulations
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Lisa Lo Piccolo
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.15A SPOUSE

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).